A

DR QUAH THONG SAI

v.

MANONMONEY SUBRAMONEY & ANOR

B

HIGH COURT MALAYA, PENANG
JOHN LOUIS O'HARA J
[CIVIL APPEAL NO: 12B-512-2009]
30 NOVEMBER 2011

C

TORT: *Negligence - Medical negligence - Appeal against decision of Sessions Court - Delivery of child conducted by appellant - Child suffered fracture of mid shaft of the right humerus and left brachial plexus injury during delivery - Whether appellant negligent - Whether burden of proof on respondents to show that appellant failed to exercise reasonable care and*

D

skill - Whether medical evidence adduced to establish delivery not conducted properly - Whether appellate court should interfere with quantum awarded - Whether Sessions Court judge erred in his decision - Payremalu Veerappan v. Dr Amarjeet Kaur & Ors

E

EVIDENCE: *Burden of proof - Negligence - Appeal against decision of Sessions Court - Delivery of child conducted by appellant - Child suffered fracture of mid shaft of the right humerus and left brachial plexus injury during delivery - Whether appellant negligent - Whether burden of proof on respondents to show that appellant failed to exercise reasonable care and skill - Payremalu Veerappan v. Dr Amarjeet Kaur & Ors*

F

CIVIL PROCEDURE: *Appeal - Appeal against decision of Sessions Court - Whether appeal a re-hearing of the suit - Whether High Court has like powers and jurisdiction on hearing appeals as the Court of Appeal has on hearing appeals from High Court - Whether appellate*

G

court should interfere with Sessions Court's findings - Courts of Judicature Act 1964, s. 29

This was an appeal by the appellant ('2nd defendant') to set aside the decision of the Sessions Court judge ('SCJ') in relation to the

H

liability and quantum awarded whereas the respondents ('plaintiffs') had also filed their appeal herein with regards to the quantum awarded to them. The facts of this case arose in relation to the alleged negligent conduct by the 2nd defendant, an obstetrician, who had attended to the delivery of the 2nd plaintiff at Hospital

I

Lam Wah Ee ('the hospital') on 31 December 2000. Before delivery, a short trial of labour was proposed and the 1st plaintiff was informed that if the progress of labour was slow, a caesarean section might be carried out. Labour was then commenced with the artificial rupture of the membrane and the 1st plaintiff was encouraged to push to facilitate delivery. During labour, the delivery of the 2nd plaintiff's head was facilitated by vacuum extraction but difficulties were encountered in delivering the anterior shoulders. Attempts were made to overcome the difficulty and the 2nd plaintiff was delivered after four to five minutes. The consultant paediatrician of the hospital noted that the 2nd plaintiff had suffered a fracture to the mid shaft of the right humerus and left brachial plexus injury. It was the plaintiffs' allegations, *inter alia*, (i) that a caesarean section should have been carried out and (ii) that the 2nd defendant had been negligent in his management and conduct of the delivery. On the other hand, the 2nd defendant denied that he had breached his statutory duty of care and submitted that at all material time prior to or upon the onset of the delivery, he had made the necessary assessments and there were no indications that vaginal delivery would not be safe or that it would cause shoulder dystocia.

Held (allowing 2nd defendant's appeal against liability; dismissing plaintiffs and 2nd defendant's appeal against quantum):

(1) Section 29 of the Courts of Judicature Act 1964 provides that all civil appeals from a subordinate court shall be by way of re-hearing and the High Court shall have the like powers and jurisdiction on the hearing of the appeals as the Court of Appeal has on the hearing of appeals from the High Court. Further, since the SCJ's decision was based upon a finding of fact in relation to the 2nd defendant's liability, an appellate court may in certain circumstances interfere with his findings. (paras 13 & 14)

(2) The burden of proof was on the plaintiffs to show that the 2nd defendant had failed to manage and conduct the delivery with reasonable care and skill, contrary to the practice as expected of a competent medical practitioner, thereby causing the plaintiffs to suffer loss and damage. The plaintiffs did not adduce any medical evidence by calling an expert obstetrician

nor did they produce any evidence in support of the negligence as pleaded. They relied on the unexplained reason as to why the defendant took four to five minutes to deliver the 2nd plaintiff. Hence, the SCJ erred in his finding that the 2nd defendant had failed to conduct the delivery of the posterior arm maneuver properly, when no medical evidence had been adduced to establish that the delivery was not conducted properly (*Payremalu Veerappan v. Dr Amarjeet Kaur & Ors*; refd). (paras 19, 20 & 27)

(3) The SCJ erred in his finding that the doctrine of *res ipsa loquitor* was applicable because the 2nd defendant's evidence that measures had been taken with regards to the delivery was a reasonable explanation and showed that the injury suffered by the 2nd plaintiff had occurred without any negligence from the 2nd defendant. Thus, there could be no presumption of negligence just because the 2nd plaintiff had suffered injuries during the delivery. (para 31)

(4) Before the court could interfere with an award for damages, it should be satisfied that the SCJ had: (i) acted on a wrong principle of law or (ii) misapprehended the facts or (iii) made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the grounds of excess or insufficiency. On the facts, there was no reason for an appellate interference with regards to quantum. (paras 17, 33 & 34)

[Order accordingly.]

Case(s) referred to:

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Harta Tuas Sdn Bhd v. UB Usahabina Sdn Bhd [2005] 6 CLJ 464 HC ***(refd)***

Kerry v. Carter [1969] 1 WLR 1327 ***(refd)***

Lim Kim Chet & Anor v. Multar Masngud [1984] 2 CLJ 77; [1984] 1 CLJ (Rep) 23 PC ***(refd)***

Payremalu Veerappan v. Dr Amarjeet Kaur & Ors [2001] 4 CLJ 380 HC ***(refd)***

Rani Varatharajoo lwn. Choong Kok Wai & Satu Lagi [2001] 1 LNS 395 HC ***(refd)***

Rosita Baharum & Anor v. Sabedin Salleh [1992] 1 CLJ 180; [1992] 3 CLJ (Rep) 497 HC ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Wong Choon Mei & Anor v. Dr. Kuldeep Singh & Anor [1985] 2 CLJ 126; [1985] CLJ (Rep) 342 FC ***(refd)***
Wong Thin Yit v. Mohamed Ali [1971] 1 LNS 151 FC ***(refd)***
Woss Corporation Sdn Bhd v. Regent Furniture Export Consortium Sdn Bhd [2004] 1 LNS 171 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 29

For the plaintiff - R Subramaniam; M/s Subra & Partners
For the defendant - JJ Chan; M/s Shearn Delamore & Co

[Editor's Note: On 21 June 2012, the Court of Appeal in Civil Appeal No. P-04-239-11, dismissed the appellants' (plaintiffs') appeal with costs.]

Reported by Kumitha Abd Majid

JUDGMENT

John Louis O'Hara J:

Introduction

[1] This matter came before me as the hearing of:

(a) Enclosure 2 – the 2nd defendant's appeal in regard to liability and quantum; and

(b) Enclosure 6 – the plaintiffs' appeal in regard to quantum,

handed down by the Sessions Court Judge, Sessions Court No. 1 George Town on 18 November 2009.

[2] In hearing the appeals from the decision of the Sessions Court Judge, I was mindful of s. 29 of the Courts of Judicature Act 1964 and as such I treated the appeals encl. 2 and encl. 6 as if they were rehearing of the plaintiffs' suit against the defendants, *albeit* based upon the appeal record before me.

[3] Upon doing so, I allowed the 2nd defendant's appeal encl. 2 and set aside the SCJ's finding of liability on the part of the defendants. In regard to quantum I saw no reason for appellate interference and so I dismissed both the 2nd defendant's encl. 2 and the plaintiffs' encl. 6 in regard to quantum.

The Factual Matrix

[4] Manonmoney a/p Subramoney the 1st plaintiff had in 1999 delivered her 1st child, a girl weighing 3 kg by way of spontaneous vaginal delivery. She is the mother of Selvha, the 2nd plaintiff who was born at the Hospital Lam Wah Ee (HLWE) on 31 December 2000. Dr. Quah Thong Sai (the 2nd defendant) was the Obstetrician who attended the delivery of the 2nd plaintiff.

[5] The 1st plaintiff had attended eight ante natal consultations at the HLWE before 31 December 2000. Consultations were uneventful and a normal vaginal delivery was expected in regard to the 2nd plaintiff.

[6] On 31 December 2000 at about 9.15pm the 1st plaintiff was admitted to HLWE in anticipation of delivery. At 9.50pm the 2nd defendant assessed the 1st plaintiff condition and conducted a vaginal examination which revealed cervix dilated at 7 - 8cm.

[7] A short trial of labour was proposed, and both the 1st plaintiff and her husband were informed that if the progress of labour was slow, a Caesarean section might be carried out, to which they agreed. Labour was then commenced with the artificial rupture of the membrane and the 1st plaintiff was encouraged to push to facilitate delivery.

[8] Another vaginal examination was carried out at 11.15pm, which showed full dilatation of the cervical opening and that the 2nd plaintiff's scalp could already be seen at the vaginal opening. The delivery of the 2nd plaintiff's head was facilitated by vacuum extraction performed by the 2nd defendant.

[9] After the delivery of the 2nd plaintiff's head, difficulty was encountered in delivering the anterior shoulders. Attempts were made to overcome the difficulty and the 2nd plaintiff was finally delivered after 4-5 minutes at 11.38pm.

[10] The 2nd plaintiff was immediately intubated and resuscitated, and was handed over to the Consultant Paediatrician of the hospital, Dr. Cheang Hon Kit for further management and treatment. The 2nd plaintiff's birth weight was 4.1kgs. The 2nd plaintiff was noted by Dr. Cheang Hon Kit to have suffered a fracture to the mid shaft of the right humerus and left brachial plexus injury.

[11] The 2nd plaintiff's condition and prognosis, as based on the assessment carried out on 26 July 2009 by Dr. Chaudhury Dhiresh Kumar, a Consultant Orthopaedic Surgeon practicing at Adventist Hospital Penang is that there is full movement of the right arm with no disabilities whatsoever, and that there is no active movement of the left shoulder joint and limited movement of the distal muscles/joints, as stated in his report dated 8 September 2009.

[12] The SCJ in allowing the plaintiffs' claim ordered the defendants to pay the plaintiffs RM72,000 interests and costs.

The Law

[13] Section 29 of the Courts of Judicature Act 1964 (the Act) provides that all civil appeals from a subordinate court shall be by way of re-hearing and the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court. See also *Woss Corporation Sdn Bhd v. Regent Furniture Export Consortium Sdn Bhd* [2004] 1 LNS 171, *Harta Tuas Sdn Bhd v. UB Usahabina Sdn Bhd* [2005] 6 CLJ 464 (both decisions of Low Hop Bing J as he then was).

[14] As regards the defendant's appeal against liability, as the SCJ's decision is based upon a finding of fact, an appellate court may in certain circumstances interfere with his findings. See *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545 per Court of Appeal:

> But we are under a duty to intervene ... where ... the trial court has so fundamentally misdirected itself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have answered at the same conclusion.

See also *Rani Varatharajoo lwn. Choong Kok Wai & Satu Lagi* [2001] 1 LNS 395; [2002] 7 MLJ 721 (head notes):

> ... an appellate court was obliged to interfere where there was a misdirection on the part of the trial judge. In the instant case this court had to consider whether the trial judge had erred in assessing the evidence or in arriving at a conclusion based on the available evidence.

[15] See also *Lim Kim Chet & Anor v. Multar Masngud* [1984] 2 CLJ 77; [1984] 1 CLJ (Rep) 23; *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, *Wong Thin Yit v. Mohamed Ali* [1971] 1 LNS 151, *Kerry v. Carter* [1969] 1 WLR 1327 per Lord Denning at p. 1376:

> This Court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts; but even if neither of these is shown, we will interfere if we are of the opinion that the judge was clearly wrong. ... We are here to put right that which has gone wrong. If we think the judge below was wrong then we ought to say so and alter the apportionment accordingly.

[16] In regard to the issue of quantum I refer to:

Topaiwah v. Salleh [1968] 1 LNS 161; [1968] 1 MLJ 284 @ page 285 per Azmi CJ:

> ... so far as this court is concerned we should, to paraphrase Greer LJ in *Flint v. Lovell* [1935] 1 KB 354, 360 be disinclined to reverse the finding of a trial judge as to the amount of damages merely because we think that if we had tired the case in the first instance we should have given a lesser sum. To justify reversing him, we should be convinced that he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The assessments which the courts have made over the years from some guide to the kind of figure which is proper and which the appellate court will follow in the light of the special facts of each particular case ...

and *Davies v. Powell Duffryn Associated Collieries Ltd* [1942] AC 601 @ 616-617 per Lord Wright:

> Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice, so the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount rule which will cover all cases but a good general guide is given by Greer LJ in *Flint v. Lovell.*

[17] In effect the court before it interferes with an award of damages should be satisfied that the SCJ has acted on a wrong principle of law or has misapprehended the facts or has for these reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

The Reasons For My Decision

[18] The basic facts are not in dispute. It is the inference that we derive from the facts that from the dispute between the parties ie, whether the defendant was negligent or not.

[19] The burden of proof is on the plaintiff to show that the 2nd defendant had failed to manage and conduct the delivery with reasonable care and skill, contrary to the practice as expected of a competent medical practitioner, thereby causing the plaintiffs to suffer loss and damage.

[20] The plaintiffs attempted to prove their case by oral evidence of the 1st plaintiff as well as relying on a Medical Text called *"Shoulder Dystocia and Birth Injury, Prevention and Treatment,* Third Edition 2009". The plaintiffs did not adduce any medical evidence by calling an expert obstetrician. The plaintiffs' counsel said that they were relying on the unexplained reason why the defendant took 4-5 minutes to deliver the 2nd plaintiff.

[21] The SCJ in his grounds of judgment stated as follows:

> 7) Bagaimanakah plaintif kedua boleh mendapat kecederaan jika defendan kedua telah melakukan Barnum maneuver dengan betul. Ini adalah kerana Barnum maneuver adalah salah satu manual maneuver yang dicipta untuk membantu melahirkan bayi dengan masalah shoulder systocia dengan selamat. Adalah didapati defendan kedua gagal melaksanakan 'delivery of the posterior arm maneuver' dengan betul. Ini menunjukkan defendan kedua telah cuai didalam melaksanakan tanggungjawabnya membantu plaintif pertama melahirkan plaintif kedua.

[22] He goes on at para. 9 of his grounds as follows:

> 9. Oleh yang demikian doktrin *res ipsa loquitur* adalah terpakai terhadap defendan dua ... Tidak ada penjelasan diberikan tentang apakah yang berlaku dalam masa 4 hingga 5 minit sehingga kelahiran plaintif kedua.

[23] At para. 10 the SCJ reverses the burden of proof when he makes the following finding:

> 10. Pada penemuan fakta, adalah didapati defendan kedua telah gagal membuktikan bahawa dia tidak melakukan kecuaian semasa menyambut kelahiran plaintif kedua ...

[24] It is my finding that the SCJ had misdirected himself in regard to his finding in para. 10 of his grounds. I refer to *Payremalu Veerappan v. Dr. Amarjeet Kaur & Ors* [2001] 4 CLJ 380, per VT Singam J as follows:

> It is settled law that it is not for the defendants to disprove the allegations as contained under the particulars or negligence in the statement of claim as the legal burden of proof still rests on the plaintiff (see *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] 8 MLJ 253 at p. 254, *Eastern Enterprises Ltd v. Ong Choo Kim* [1969] 1 LNS 35; [1969] 1 MLJ 236).

[25] It is my finding that the SCJ has not accorded satisfactory and proper judicial appreciation to the evidence and in particular the testimony of the defendant.

[26] The plaintiffs gave no evidence in support of any of the allegations of negligence as pleaded. No medical evidence had been called by the plaintiffs through an expert obstetrician in support of the plaintiffs allegation that firstly, a Caesarean section should have been carried out, that secondly, the delivery had been conducted improperly by the defendant, and that thirdly, the 2nd defendant had been negligent in his management and conduct of the delivery.

[27] In the absence of any evidence adduced by the plaintiffs in support of their allegations of negligence as pleaded, the SCJ therefore erred in his finding that the appellant had failed to conduct the "delivery of the posterior arm maneuver properly, when no medical evidence had been adduced to establish that delivery was not conducted properly. See *Payremalu (supra)* at p. 398:

> ... this court is of the view that it was important for the plaintiff to have adduced medical or expert evidence to support the allegations contained in the Statement of Claim against the defendants and this could have also assisted the court or thrown some light in arriving at this decision but unfortunately there was no such evidence before the trial court.

[28] The 2nd defendant denied breaching his duty of care to the plaintiff. His evidence was to the effect that at all material time prior to or upon the onset of delivery, he had made the necessary assessments and that there were no indications that vaginal delivery would not be safe or that vaginal delivery would cause shoulder dystocia with all the attendant consequences; that the difficulty only arose after the delivery of the 2nd plaintiff's head and that he had taken all reasonable steps to manage the shoulder dystocia and to facilitate delivery.

[29] A perusal of the evidence shows that the 4-5 minutes were in fact not unexplained. The 4-5 minutes was because of the difficulty experienced in the delivery of the shoulder. It must be remembered that the baby when delivered was 4.1 kg which is over 9 lbs and the 1st plaintiff's effort in pushing was very poor.

[30] While it was not possible to cross-examine the Medical Text produced by the plaintiffs, the 2nd defendant was deprived of his right to call his own expert medical witness, Dato' Dr. Alex Matthews because he was in South Africa at the date of the hearing and the Hakim Mahkamah Sesyen refused to grant the defendant an adjournment to allow the witness to attend court.

[31] The SCJ had further erred in his finding that the doctrine of *res ipsa loquitor* is applicable because the 2nd defendant's evidence on the measures that had been taken in regard to the delivery is a reasonable explanation and show that the injury suffered by the 2nd plaintiff had occurred without any negligence on the part of the 2nd defendant. See *Wong Choon Mei & Anor v. Dr. Kuldeep Singh & Anor* [1985] 2 CLJ 126; [1985] CLJ (Rep) 342. To my mind there can be no presumption of negligence on the part of the 2nd defendant just because the 2nd plaintiff had suffered injuries during the delivery.

[32] In regard to damages awarded, the SCJ quantified them as follows:

i) fracture of right arm in the midshaft of the humerus – RM12,000, and

ii) Bracial Plexus Lesion of the left arm involving the C6, C7, C8 and T1 – RM60,000.

[33] Before a court interferes with an award of damages it should be satisfied that the SCJ had acted on a wrong principle of law or in effect has misapprehended the facts or has for these reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

[34] In regard to quantum, I see no reason for appellate interference and am dismissing both the 2nd defendant's notis rayuan lampiran 2 and the plaintiff's notis rayuan lampiran 6 in regard to quantum.

Conclusion

[35] Therefore in regard to encl. 2 and encl. 6, quoting *Rosita Baharom & Anor v. Sabedin Salleh* [1992] 1 CLJ 180; [1992] 3 CLJ (Rep) 497 per Edgar Joseph Jr "my human sympathies are for the plaintiff but I am not at liberty to indulge them" and so I conclude by allowing the 2nd defendant's appeal against liability but dismiss both the 2nd defendant's and plaintiffs' appeal against quantum with no order as to costs.

Order

[36] So ordered accordingly.